2010 WL 10011230 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

STATE OF HAWAII, Plaintiff-Appelee,
v.
STEVEN SCHAEFER & APRIL SCHAEFER, Defendants-Appellants.

Nos. 29953, 29954.
April 15, 2010.

Appeal from the Decision of June 18, 2009
District Court of the Fifth Circuit, State of Hawai'i
Honorable Laurel Loo, Judge Presiding

Answering Brief of Plaintiff-Appellee State of Hawaii Appendix a and Certificate of Service

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***1 I. Counter-Statement of the Case**

Between 1997 and 2000, Defendants-Appellants Steven Schaefer and April Schaefer victimized several Kaua'i residents, many of whom were **elderly**. [Transcript (TR) 3/12/09 at 8-9 & TR 10/1/04 at 98-105.] They used religion as a means to gain the trust and loyalty of their naive victims. Specifically, Appellants told their victims that Appellant Steven Schaefer was the advocate general for the Hawaiian Kingdom and that they had to join his congregation, or they would not have any sovereignty protection. Appellants also told them that a trust would be established for the new government and that they would never again have to pay taxes or pay off their mortgages. So, the victims joined Appellants' organization by paying substantial fees to Appellants, believing that in doing so, they would not have to pay taxes or their mortgage debt. Consequently, many of the victims' homes were foreclosed upon and they suffered dearly as a result of having poor credit. [TR 10/1/04 at 98-105; TR 6/18/09 at 14-16.]

On February 9, 2004, in *State v. Steven Schaefer and April Schaefer*, CR No. LC 04-072, in the District Court of the Fifth Circuit, a Complaint was filed against both Appellants, charging them with a total of 21 counts. [ROA at 1-7.] Most of the counts (1 & 6-21) were for Theft in the Third Degree. The remaining counts were for False and Fraudulent Statements (counts 2 & 3), and Willful Failure to File Return (counts 4 & 5).

Due to a limitation with the District Court's computer system (which does not accept more than one defendant for a single case), a Complaint was filed on March 18, 2004, in LC 04-169 against April Schaefer only. [ROA at 8-13.] Also, on April 1, 2004, in LC 04-072, ***2** an Amended Complaint was filed against Steven Schaefer only. [ROA at 20-24.] In both of these complaints, the charges were identical to those in the February 9, 2004 Complaint.

On March 19, 2004, Appellant April Schaefer entered No Contest pleas to 19 counts - all of the charges except for counts 2 (False and Fraudulent Statements) and 5 (Willful Failure to File Return). On that same date, Appellant Steven Schaefer entered No Contest Pleas to 19 counts - all of the charges except for counts 3 (False and Fraudulent Statements) and 4 (Willful Failure to File Return). [ROA at 19-21 (April) & 16-18 (Steven).]

As part of the plea agreement, the State agreed to the preparation of a PSI - a presentence diagnosis report. The plea agreement did not specify whether the PSI was to be a full PSI or a partial PSI. [See Addendum to March 19, 2004 No Contest plea form: "I agree that a presentence investigative report (PSI) will be completed prior to sentencing." ROA at 21 (April) & 18 (Steven).]

On June 30, 2004, partial PSIs were prepared for Appellants' sentencing hearing and duly delivered to Appellants. [ROA at 22 (April) & 25 (Steven).]

On July 13, 2004, Steven Schaefer filed a Motion for acceptance of DANC plea. In his motion, he did not take issue at all with the adequacy of the partial PSIs. [ROA at 30-147 (April).]

The sentencing hearing was continued three times between the entry of Appellants' No Contest pleas and the October 1, 2004 sentencing hearing. In none of these documents or calendar calls did Appellants take issue with the adequacy of the partial PSIs. [ROA at 26-31, 33-36, & 38-43 (Steven) and 23-27, 148-151, 153-155, & 156-161 (April).]

Appellants were initially sentenced by the District Court on October 1, 2004. On that day, they first objected to the scope of the partial PSIs. [TR 10/1/04 at 3-4 & 7.] They ***3** requested a continuance in the sentencing hearing so that the partial PSIs could be supplemented - to amount to full PSIs. The State of Hawai'i objected to the continuance, arguing that Appellants' request to supplement the PSIs was not timely and was intended to delay sentencing. [Id. at 4]

Probation Officer Sharon Nakasone testified at that sentencing hearing that whether or not a full PSI is prepared is determined based on a "proxy score." Whether the defendant is charged with a felony or misdemeanor does not determine whether a full or partial PSI is prepared. She testified that the Defendants proxy score indicated that partial PSIs should be prepared. She also

testified that the proxy system went into effect on March 31, 2004. [TR 10/1/04 at 8-10.] She did not testify as to whether, before March 31, 2004, defendants who pled guilty to misdemeanors would normally have full or partial PSIs prepared.

Lynn Garcia, the probation officer who prepared the partial PSIs for Appellants, also testified at the sentencing hearing. She explained the differences between full and partial PSIs. She *did* not testify as to whether, before March 31, 2004, defendants who pled guilty to misdemeanors would normally have full or partial PSIs prepared in advance of sentencing. [TR 10/1/04 at 29-38.]

The District Court Judge, the Honorable Trudy Senda, denied Appellants' October 1, 2004 oral request for a full PSIs. [See Order filed October 20, 2004 - ROA at 117-118 (Steven) and 236-237 (April); TR 10/1/04 at 49-53.] At the sentencing hearing, the court noted that Appellants had been given ample time to review the partial PSIs, but did not object to them until the sentencing hearing (about three months later). The court also noted that Appellants had the opportunity to compile any documentation they wanted, for the court's ***4** consideration at sentencing, and they could make arguments as to any of the probation factors set forth in HRS 706-621. [TR 10/1/04 at 50.]

The court, based on Appellants' motion for preparation of a full PSI, agreed to strike certain portions of the partial PSIs, such as unsigned letters from people claiming to be victims who were not named as victims in the complaints. [TR 10/1/04 at 89-97.]

Appellants also moved in that October 1, 2004 sentencing hearing, to dismiss the complaints that were filed against them, claiming that extrajudicial statements by the DPA, which appeared in a front-page article of the Garden Island newspaper on August 24, 2004, violated their right to a fair trial. They also moved to change venue for the sentencing hearing, to another district court outside Kauai. The court denied these motions. [See Orders filed October 20, 2004, ROA at 122-123, 125-126 (Steven) & 239-240, 245-246 (April); TR 10/1/04 at 68 and 72; TR 10/1/04 at 64-70.]

At sentencing, the court accepted Appellants' No Contest pleas, denied Steven's DANC request, sentenced Appellants, consistent with their plea agreements, to serve concurrent one-year terms of imprisonment for each of the 19 misdemeanor offenses that they pled No contest to, to pay restitution, jointly and severally, in the amount of $33,876.57 (this amount, agreed to as part of the plea agreement, did not include more than $25,000 in restitution for Adam and Mildred Perreira), and to pay $950 in criminal injury compensation fees. [TR 10/1/04 at 121-133.]

On October 5, 2004, the circuit court charges pending against Appellants in *State v. April & Steven Schaefer*, CR 03-1-0060, were dismissed with prejudice, as part of the plea agreement in the above-entitled case. [See footnote 3 (page 8) and Exhibits A & B, attached ***5** to State of Hawai'i November 7, 2008 Motion to Supplement PSIs, ROA at 153, 160-161 (Steven) and ROA at 271, 278-279 (April).]

On October 8, 2004, after dismissal of the Circuit Court case, Appellants appealed their convictions in the above-entitled case, and were released pending appeal on or about October 13, 2004. [See October 13, 2004 Order(s) Releasing Defendant(s) Immediately Pending Appeal, ROA at 105 (Steven) and 222 (April).]

On April 30, 2008, in Nos. 26916 & 26917, the ICA filed its decision on Appellants' appeal. The ICA vacated Appellants' sentences because the sentencing Judge did not inquire with Appellants personally as to whether they wished to address the court prior to being sentenced. [See ICA decision, at page 2.]

The ICA also concluded that the District Court was not statutorily required to prepare a PSI for Appellants, before sentencing them. HRS 706-601(1). The ICA also concluded that as part of the plea agreement with the State, Appellants agreed that a PSI would be completed prior to sentencing, but it was not clear from the docketed record on appeal whether the parties agreed that full or partial PSIs would be prepared. It was also not clear whether the District Court agreed to be bound by the plea agreements, whether the District Court ordered a “full PSI” at the time it accepted Appellants' No Contest pleas, and if so, what the District Court expected to be included in the full PSI.

Therefore, the ICA directed that upon remand, the District Court shall determine the scope of the parties' plea agreements, and whether the preparation of partial PSIs was a material breach of the plea agreements. See ICA decision, at page 20-21. Moreover, if the resentencing judge (other than Judge Senda) determines that the partial PSIs materially breached the parties' plea agreements, the resentencing judge shall either: (1) allow ***6** Appellants to withdraw their No Contest pleas; or (2) order the partial PSIs to be amended or supplemented to satisfy the parties' plea agreements, and consider the supplemented partial PSIs in resentencing Appellants. [See ICA decision, at page 21.]

The ICA further clarified in its decision (at pages 19-20) that if supplementation of Appellants' partial PSIs was ordered by the District Court, they should be supplemented with information addressed in HRS 706-602(1)(b):

(b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habit;

Appellants subsequently filed a *certiorari* application with the Hawai'i Supreme Court, for review of the ICA's decision. On September 17, 2008, the Hawai'i Supreme Court rejected their application.

Procedure on remand back to the District Court for resentencing

On November 7, 2008, the State of Hawaii filed its Motion for Order Directing Supplementation of PSI & Setting Sentencing Hearing. [ROA at 146-163 (Steven) & 264-281 (April).] In their memorandum in opposition, Appellants first moved to withdraw their 2004 No Contest pleas. [ROA at 177-186 (Steven) & 293-302 (April).] The State's motion was continued in court on February 12, 2009, to March 12, 2009.

On March 12, 2009, with both Appellants present with their respective counsels, the District Court (Judge Laurel Loo) granted the State's motion to resentence Appellants with full PSIs. Specifically, the court found that the 2004 plea agreements were ambiguous as to whether full PSIs were to be prepared and the parties, at the time of entering into the plea agreement, did ***7** not actually contemplate whether full or partial PSIs would be prepared. The court also found that the State did NOT materially breach the plea agreement or act in bad faith by opposing Appellants' October 1, 2004 oral motion to supplement the June 30, 2004 partial PSIs, especially in light of the fact that Appellants did not move, prior to the October 1, 2004 sentencing hearing, to supplement the partial PSIs. [TR 3/12/09 at 34-36; ROA at 215-216 (Steven) & 332-333 (April).]

Therefore, the District Court, in order to make Appellants whole, ordered that new, full PSIs be prepared prior to resentencing, by a probation officer other than Lynn Garcia, who prepared the June 30, 2004 partial PSIs. [TR 3/1209 at 36-37; ROA at 215-216 (Steven) & 332-333 (April).]

Appellants were re-sentenced in the District Court (Judge Loo) on June 18, 2009. They were present with their respective counsels. Appellants elected to personally address the court. [TR 6/18/09 at 38-43 (Steven) & 51 (April). They were re-sentenced to one year incarceration each and to jointly and severally pay restitution in a total amount of $33,876.57 to the victims and to each pay $1,045.00 - a Crime Victim Compensation fee. [TR 6/18/09 at 53-64; ROA at 218-236 (Steven) & 335-353 (April).] This sentence is identical to their 2004 sentences, except that since they were first sentenced in 2004, the standard CVC fee was statutorily increased by $5 per misdemeanor count, so that total fee was increased from $950 to $1,045.00.

Appellants timely appealed their convictions. [ROA at 252-294 (Steven) & 369-411 (April).] Appellants are not incarcerated, as they successfully moved to stay imposition of their sentences pending outcome of this appeal.

***8** II. Standards of Review

A. The District Court's finding that the parties did not contemplate, at the time Appellants entered their No Contest pleas on March 19, 2004, whether the PSIs would be full or partial, is reviewed for clear error as it involves a question of fact. *State v. Abbott*, 79 Hawai'i 317, 319, 901 P.2d 1296, 1298 (App. 1995).

B. The District Court's finding that the State did not breach the plea agreements by objecting, at sentencing, to the supplementation of the PSIs, is reviewed de novo. *State v. Miller*, 122 Hawai'i 92, 99, 223 P.3d 157, 164 (2010).

C. The District Court's denial of Appellants' motion to withdraw their No Contest pleas is reviewed for an **abuse** of discretion. *State v. Malivao*, 105 Hawai'i 414, 416, 98 P.3d 285, 287 (App. 2004).

III. Argument

A. The District Court (Judge Laurel Loo) properly resentenced Appellants with new, full PSIs.

1. The District Court properly concluded that the parties did not contemplate, when Appellants entered their No Contest pleas on March 19, 2004, whether the PSIs to be prepared would be full or partial.

Appellants claim that the District Court clearly erred by finding that the parties did not contemplate, when Appellants entered their No Contest pleas on March 19, 2004, whether the PSIs that were to be prepared would be full or partial. [Opening Brief at 12; TR 3/12/09 at 34-37.]

The District Court's finding of fact that the parties did not contemplate whether the PSIs would be full or partial is reviewed for clear error. Abbott, supra.

***9** The plea agreement itself is silent as to whether the PSIs to be prepared would be full or partial. Other than a single sentence in the change of plea form, the preparation of the PSIs was not addressed in their plea agreements. The No Contest plea form states: *"I agree that a presentence investigative report (PSI) will be completed prior to sentencing."* [See Addendum to March 19, 2004 No Contest plea form, ROA at 18 (Steven) & 21 (April).]

Moreover, although Appellants claim that when they pled No Contest, they actually believed that a full standard PSI would be prepared [Opening Brief at 12], there is nothing in the record to substantiate their claim as to their subject belief. First, Appellants do not actually assert that this was their subjective belief. Their counsels, on remand, have repeatedly made this assertion, but Appellants have never done so. Appellants' counsels, in their February 18, 2009 Joint Memorandum in Opposition to the State of Hawai'i Motion for Order Directing Supplementation of PSI & Setting Sentencing Hearing, in declarations, assert that their clients "assumed" when they entered their No Contest pleas in 2004, that the PSIs to be prepared would be full PSIs. [ROA at 300-301 (April) and 184-184 (Steven).]

In addition, Appellants' claim that they believed that a full PSI would be prepared is seriously undermined by the fact that they waited until three months after they received the partial PSIs (which are clearly titled, on the first page, "Partial Presentence Report") on or about June 30, 2004, to object to the partial nature of the PSIs. Their first objection to the partial nature of the PSIs was not made until the October 1, 2004 sentencing hearing, notwithstanding the fact that between the Change of Plea hearing and the sentencing hearing, Appellants filed various stipulations to continue the sentencing hearing and Steven filed a Motion for Deferred Acceptance of his No Contest plea. [ROA at 26-31, 33-36, & 38-43 (Steven) and 23-27, 148-151, 153-155, & 156-161 (April).]

***10** Therefore, this court must conclude that the District Court properly concluded that Appellants did not contemplate, when they entered their No Contest pleas, whether full PSIs would be prepared.

2. Even assuming that Appellants actually believed, when they entered their No Contest pleas on March 19, 2004, that full PSIs would be prepared, they failed to establish that their belief was reasonable.

Appellants claim that the statewide practice of the judiciary, at the time they entered their pleas, was to prepare full PSIs, in cases where PSIs were ordered prepared and therefore, they reasonably believed that full PSIs would be prepared for them. [Opening Brief at 13, 23.] Appellant's point out that the "proxy system" (the method by which a probation officer determines whether the PSI to be prepared is full or partial), which went into effect on March 31,2004 (a couple of weeks after Appellants entered their pleas), they reasonably believed, when they entered their pleas, that full PSIs would be prepared.

However, there is nothing in the record to substantiate Appellants' claim that they reasonably believed, when they entered their pleas on March 19, 2004, that full PSIs would be prepared for their misdemeanor pleas [1] . Appellants claim in their Opening Brief that, "...[A]s of March 19, 2004, the date Defendants entered their pleas, the usual and customary practice of ***11** ACPSB statewide was to generate a 'full standard' PSI report whenever a report had been ordered." [Opening Brief at 23.] However, they have no authority to support their assertion.

Neither Sharon Nakasone nor Lynn Garcia, probation officers, testified that when PSIs were prepared prior to March 31, 2004, that those PSIs were generally full PSIs. They also did not testify that in misdemeanor cases, prior to that date, that full PSIs were normally prepared. The only certain facts on this issue is that PSIs are not required in misdemeanor cases and that it was the practice of probation officers, when they prepared *full* PSIs, to evaluate the factors listed in HRS 706-621 ["Factors to be considered in imposing a term of probation."]. See ICA opinion in Nos. 26916 & 26917, at pages 17-18.

Therefore, this court must reject Appellants' assertion that they reasonably believed, when they entered their No Contest pleas, that full PSIs would be prepared.

3. The District Court properly found that the State did not breach the plea agreement with Appellants by objecting to the continuance of the sentencing hearing for supplementation of the PSIs.

Appellants claim that the District Court clearly erred by finding that the State did not materially breach the parties' plea agreements by objecting, at the October 1, 2004 sentencing hearing, to Appellants' request to continue the sentencing hearing for supplementation of the PSIs. [Opening Brief at 12.]

After remand from the ICA to the District Court, at the March 12, 2009 hearing on the State's Motion for Order Directing Supplementation of PSI and Setting Sentencing Hearing, the District Court (Honorable Laurel Loo) found that the State did not materially breach the parties' plea agreements by objecting, at the October 1, 2004 sentencing hearing, to a continuance in the sentencing hearing to supplement the PSIs to make them full PSIs. [ROA at 215-216 (Steven) & 332-333 (April).] Specifically, the court noted:

***12** THE COURT: The Court find that what this Court believed happened in this plea bargain is that both the State and the Defense counsel never actually considered what a PSI is, whether it be partial or full, therefore, the Court does not find bad faith on either party, the State or the Defense, in proceeding with their belief, however mutually exclusive it might have been that one side may have assumed they were getting a full PSI and the other side may not have had that assumption....

The Court - the cases that have been cited today, this Court believes all considered situations in which the Prosecutors or the Attorneys General actually did act in a manner that was a material breach of the plea agreements. This Court does not find that the plea agreement was materially breached....

Mr. Aluli [counsel for Steven Schaefer] made very eloquent arguments to this Court that they weren't given the benefit of what they were bargained for, and that he had fully discussed with his client that they only shot to get probation and a deferred

acceptance was for the Court to get a full picture of the facts and, therefore, that is why he believed that a full PSI would be his client's best shot at getting what they wanted at sentencing.

The Court specifically finds that the arguments of the Prosecutors, aganst, supplementation of the PSI, was not a material breach of the plea agreement because the Court still does not find that the State made any kind of error or miscommunication or a deliberate attempt to breach an plea agreement because the Court does not - just does not see that this was a bait-and-switch game by the Prosecutor, or the State.

Therefore, this Court is going to order, find that there was no material breach of the plea agreement. Nevertheless, the Court will order the parties to be resentenced at a future date and will order a complete full PSI to be prepared, not a supplementary PSI, but a full PSI.

[TR 3/12/09 at 34-36 (emphases added).]

Whether the State breached the terms of a plea agreement is reviewed *de novo. Miller*, 122 Hawai'i at 99, 223 P.3d at 164.

In *State v. Abbott*, the ICA noted:

> The touchstone for determining whether a breach of a plea agreement has occurred, is whether the defendant has reasonable grounds for reliance on his interpretation of the prosecutor's promise and whether the defendant in fact relied to his detriment on that promise.

State v. Abbott, 79 Hawai'i 317, 320, 901 P.2d 1296, 1299 (App. 1995).

In *Abbott*, pursuant to a plea agreement with the State, the defendant entered a no contest plea. The State agreed to dismiss the remaining charges and to recommend at ***13** sentencing that the defendant complete five years of probation, with the option of recommending a year in jail and other terms and conditions of probation, such as a fine, counseling, etc. *Abbott*, 79 Hawai'i at 319, 901 P.2d at 1298.

At sentencing, the State argued that the defendant should complete five years of probation and be incarcerated for one year, without credit for time served pre-sentence. The State also requested that he take an HIV test. The court granted the State's request to impose the HIV test, but denied the State's request to deny credit for time served pre-sentence. Despite the State's recommendation the court sentenced the defendant to five ears incarceration. Id.

The defendant subsequently filed a motion to reconsider sentence. He argued that the State breached the plea agreement by recommending a year and five months incarceration (one year plus the time served incarcerated pre-sentence) and by requesting that the defendant undergo HIV testing. The court denied the motion, except that it set aside its order that the defendant undergo HIV testing. Id.

On appeal of the sentencing order, the defendant argued that both of the State's requests were illegal. The ICA agreed with the defendant, concluding that the State had materially breached the plea agreement by requesting two terms in violation of the Hawai'i Revised Statutes. Therefore, the ICA vacated his sentence and ordered resentencing before a new judge. *Abbott*, 79 Hawai'i at 321, 901 P.2d at 1300.

In contrast to the facts in *Abbott*, in this case, the completion of a partialor PSI for misdemeanor pleas does not violate the Hawai'i Revised Statutes. Also, the defendant in *Abbott* did not delay moving to reconsider his sentence, upon the State's violation of the plea agreement: he moved to reconsider his sentence just five days after the sentencing hearing. In contrast, in this case, Appellants waited *three months* after receiving their partial PSIs to object to them and to request a continuance in the sentencing

hearing. Moreover, the sentencing hearing had already been ***14** continued three times from the original sentencing date of July 2, 2004. There were various written stipulations to continue the sentencing hearing, all filed by Appellants' counsel, none of which took issue with the partial nature of the PSIs. [ROA at 26-31, 33-36, & 38-43 (Steven) and 23-27, 148-151, 153-155, & 156-161 (April).]

A recent decision by the Hawai'i Supreme Court in *State v. Miller, supra,* also supports the State's position that the District court properly denied Appellants' request to withdraw their No Contest pleas. In that case, the defendant, as part of a plea agreement with the State, entered a No Contest plea to Assault in the Third Degree. The State agreed to take no position on the defendant's request for a DANC plea. *Miller,* 122 Hawai'i at 95, 223 P.3d at 160. However, at sentencing, the State argued facts of the case - that it was borderline strangulation and that the victim was seriously bruised - that supported denial of the DANC plea, even though the State did not explicitly oppose the DANC plea. *Miller,* 122 Hawai'i at 96-97, 223 P.3d at 161-162.

The defendant appealed and the ICA affirmed his sentence and conviction. The ICA reasoned that the State, at sentencing, did not explicitly take a position on the DANC plea request and the defendant failed to object to the State'S arguments. *Miller,* 122 Hawai'i at 97-98, 223 P.3d at 162-163.

The defendant then filed a *certiorari* application. The Hawai'i Supreme Court noted:

> A plea agreement is essentially a contract entered into between the State and the defendant, in which the defendant agrees to plead guilty or no contest to a charge and to forego certain constitutional rights (including the right to trial) in exchange for which the State promises some form in leniency or cooperation in prosecution. Indeed, courts have often looked to contract law analogies in determining the rights and obligations of the parties to a plea agreement. *However, because the plea negotiation process implicates constitutional considerations - including the fairness and voluntariness of the plea - we have recognized that resort to contract principles cannot be solely determinative of the rights and duties comprising the plea bargain.*

Miller, citing *State v. Adams,* 76 Hawai'i 408, 412, 879 P.2d 513, 517 (1994) (emphasis in text).

***15** The Hawai'i Supreme Court concluded in *Miller* that *Adams, infra,* was controlling. The court concluded that in both cases, the State attempted to accomplish indirectly what it had promised not to do directly. *Miller,* 122 Hawai'i at 105, 223 P.3d 170. Therefore, the court in Miller found that the ICA gravely erred by failing to find plain error in the State'S violation of the plea agreement. The court ordered that on remand, the defendant be resentenced by another judge. *Miller,* 122 Hawai'i at 106, 223 P.3d at 171.

In *Adams,* a defendant-physician who was being prosecuted for Medicaid fraud and theft entered into a plea agreement with the State. The defendant informed the court, upon entering his No Contest plea, that he intended to ask for a DANC plea and request that he not be sentenced to imprisonment. The State agreed to "stand silent on these issues and not oppose the Defendant's request." *Adams,* 76 Hawai'i at 409-410, 879 P.2d at 514-515.

After the change of plea hearing and prior to sentencing, the Deputy Attorney General (DAG) forwarded to the court's Adult Probation Division (APD) a written statement indicating that: (1) the defendant had been charged with just 21 of the hundreds of false claims available; (2) his sexually assaultive behavior stemmed from his extremely low opinion of women; (3) he was a danger to the community because his overwhelming desire to generate bills overrode any interest in his patients; and (4) he falsely claimed to be destitute in order to have a defense attorney provided at taxpayer expense. *Adams,* 76 Hawai'i at 410, 879 P.2d at 515.

Thereafter, the defendant moved to withdraw his no contest plea, claiming that the State, via the DAG, had breached its agreement to "stand silent" on the issues of his request for a DANC and for no incarceration. *Id.*

The Hawai'i Supreme Court agreed with the defendant (that the State had breached the plea agreement) and consequently, considered whether resentencing was a meaningful alternative for him. The court noted that although the defendant had been eligible for probation when he was ***16** originally sentenced, he was no longer eligible for probation.[2] In addition, the defendant was no longer eligible for a DANC because of his sexual assault convictions. HRS 853-4(6). *Adams,* 76 Hawai'i at 415-416, 879 P.2d at 520-521.

Because less severe sentencing alternatives that were originally available to the defendant were not available upon resentencing, the Hawai'i Supreme Court concluded that resentencing was not a meaningful alternative. Consequently, it vacated his sentence and the circuit court's order denying the defendant's motion to withdraw his no contest plea, and remanded for entry of an order granting his motion. Adams, 76 Hawai'i at 415, 879 P.2d at 520.

Unlike the facts in *Miller* and *Adams,* in this case, the State never agreed to the preparation of full PSIs and the record does not indicate a reasonable belief by the parties that full PSIs would be prepared.

In sum, because the parties' plea agreements are silent as to whether the PSIs to be prepared would be full or partial, because full PSIs are not statutorily required in misdemeanor cases, and based upon Appellants' very late request to have the partial PSIs supplemented, this court should find that the District Court properly found, at the March 12,2009 hearing, that the State did not materially breach the March 19,2004 plea agreement by objecting, at the October 1,2004 sentencing hearing, to a continuance of the sentencing hearing to supplement the PSIs to amount to full PSIs.

***17 B. The District Court acted within its discretion in denying Appellants' motion to withdraw their No Contest pleas.**

Appellants request that this court vacate their sentences and remand this case with instructions to permit them to withdraw their 2004 No Contest pleas. [Opening Brief at 27.]

The District Court, finding that the State had not materially breached the parties plea agreements, denied Appellants' request to withdraw their 2004 No Contest pleas. [ROA at 215-216 (Steven) & 332-333 (April).] Specifically, the court stated:

THE COURT: ...This court has also looked at the factors in determining whether the Defense's oral motion[3] to withdraw their pleas, what factors to consider in considering that avenue, as opposed to the State's request for an additional or supplemental information to the PSI and resentencing by a different judge...

I believe that there is a way to go towards substantially making the defendants whole by giving them the benefit of the bargain.... Therefore, this Court is going to order, find that there was no material breach of the plea agreement. Nevertheless, the Court will order the parties to be resentenced at a future date, and will order a complete full PSI to be prepared, not a supplementary PSI, but a full PSI.

[TR 3/12/09 at 36-37.]

The District Court's denial of Appellants' motion to withdraw their No Contest pleas is reviewed for an **abuse** of discretion. *State v. Malivao,* 105 Hawai'i 414, 416, 98 P.3d 285, 287 (App. 2004).

On remand to the District Court, the ICA directed:

> If the resentencing judge determines that Partial PSIs materially breached the parties' plea agreements, the resentencing judge shall either (1) allow Appellants to withdraw their no contest pleas or (2) order the

> Partial PSIs to be amended or supplemented to satisfy the parties' plea agreements. If alternative 2 applies, the district court shall duly consider the Partial PSIs, as supplemented, in resentencing Steven and April.

***18** See ICA decision in Nos. 26916 & 26917, at page 21 (citation omitted).

Because the District Court properly found that the State had not materially breached the plea agreements by objecting, at the October 1, 2004 sentencing hearing, to a continuance of the sentencing hearing to supplement the partial PSIs, the District court properly could have sentenced Appellants without supplementing the partial PSIs.

However, the District Court, to maximize Appellants' due process rights, ordered new, full PSIs, for resentencing and even directed that another probation officer prepare them. The court reasoned that it could make Appellants "whole" by ordering the preparation of full PSIs, since that was the basis of their first appeal. [TR 3/12/09 at 36-37.]

Moreover, even assuming that the District Court erred by finding that the State did not materially breach the 2004 plea agreements, Appellants have failed to establish that the District Court **abused** its discretion in denying their request to withdraw their pleas.

In opposing Appellants' request to withdraw their No Contest pleas, the State argued that many of its witnesses, who were already **elderly** when the offenses were committed between 1997 and 1999, were now, of course, a decade older and naturally, their memories have faded. Also, one of the most active victims in this case, and one of the State's material witnesses, Adam Pereira, passed away. See ROA at 159 (Steven) and 277 (April). Appellants did not refute these facts at the March 12, 2009 hearing. In addition, the State dismissed a pending felony case against Appellants, in exchange for their No Contest pleas in the subject case. [4] Although an order dismissing the ***19** charges in the Indictment in *State v. Steven Schaefer & April Schaefer*, CR No. 03-1-0060, was never filed, the circuit court ordered the dismissal of those charges on October 5, 2004. See note 4, *supra*.

Also, as every sentencing alternative (such as a DANC plea for Steven) that was available to Appellants in 2004 was also available to them in 2009, were not prejudiced by resentencing, rather than being allowed to withdraw their No Contest pleas. [See State of Hawai'i Motion for Order Directing Supplementation of PSI & Setting Sentencing Hearing and its subsequent Reply Memorandum, ROA at 146-163 & 197-203 (Steven) and 264-281 & 313-319 (April); TR 3/12/09 at 25-27.] Appellants did not refute the State's arguments.

In contrast, in *State v. Adams*, because less severe sentencing alternatives that were originally available to the defendant were not available upon resentencing, the Hawai'i Supreme Court concluded that resentencing, as a remedy for the State's breach of the plea agreement, was not a meaningful alternative. *Adams*, 76 Hawai'i at 415, 879 P.2d at 520.

Appellants claim that the District Court's order for the preparation of new, full PSIs is a concession that Appellants did not receive the benefit of their plea bargain. The State's position is that the District court ordered the new, full PSIs because even though it concluded that the State did not materially breach the plea agreements, it chose to maximize Appellants' due process rights by giving them what they originally sought - to be sentenced with the benefit of full PSIs.

Therefore, because the District Court found that the State had not materially breached the 2004 plea agreements with Appellants, this court should find that the court did not **abuse** its discretion in denying their request to withdraw their No Contest pleas.

***20** Moreover, even if this court concludes that upon remand from the ICA, with vacated sentences, Appellant's 2009 request to withdraw their No Contest pleas amounted to a pre-sentence request, rather than a post-sentence request (after the original 2004 sentencing), Appellants still failed to establish a "fair and just reason" for the request and that the State had not relied on their pleas to its substantial prejudice. *State v. Topasna*, 94 Hawai'i 444,451,16 P.3d 849, 856 (App. 2000). Given that the original basis for their objection to their 2004 sentencing hearing was that they were denied full PSIs, and given that the

District Court in 2009 ordered new, full PSIs upon resentencing, Appellants failed to prove a fair and just reason to support their requests to withdraw their No Contest pleas. Also, Appellants failed to establish that they could not possibly be given a fair sentence in the Fifth Circuit. See *State v. Chow*, 77 Hawai'i 241, 251, 883 P.2d 663,673 (App. 1994), and *Schutter v. Soong*, 76 Hawai'i 187, 208, 873 P.2d 66, 87 (note 6) (1994), directing that where the defendant's right of allocution was violated during the original sentencing hearing, resentencing before another judge within the same circuit was the appropriate remedy. Furthermore, even assuming that it were true that Appellants could not be fairly sentenced by a judge in the Fifth Circuit - the remedy would be for a judge from another circuit to travel to the Fifth Circuit to sentence them; it would not entitle them to withdraw their no contest pleas.

Therefore, even in light of the *Adams, supra* rule [5] that when the State breaches a plea agreement, the defendant's choice of remedy - resentencing or withdrawal of the plea - is afforded "great weight," given the prejudice to the State if pleas were withdrawn and that Appellants did not move to withdraw their pleas until 2009 - on remand after their first appeal -- this court must reject ***21** Appellants' claim that the District Court **abused** its discretion by denying their request to withdraw their No Contest pleas.

IV. Relevant Statutes, Court Rules, Constitutional Provisions

See Appendix A, attached hereto.

V. Conclusion

Based on the foregoing arguments and authorities, the State of Hawai'i respectfully requests that this Honorable Court affirm Appellants' Judgment of Conviction and Sentence, dated June 18, 2009.

Footnotes

1 Although Appellants' reference the ICA's decision, which notes that the District Court clerk's minutes of the March 19, 2004 Change of Plea hearing indicate that the court ordered a full PSI for sentencing, the ICA also noted that at the October 1, 2004 sentencing hearing, Appellants did not argue that the court had already ordered a full PSI. Instead, they argued that a full PSI should be ordered by the court. Furthermore, they never argued in their Opening Brief during their first appeal (Nos. 26916 & 26917) that the court had ordered full PSIs during the Change of Plea hearing, Thus, it appears that the first time Appellants learned about the notation in the clerk's minutes was when they read the ICA's decision. Clearly, then, the court clerk's minutes do not corroborate their claimed belief that full PSIs were ordered at their March 19, 2004 Change of Plea hearing. Moreover, Appellants have not requested that the March 19, 2004 Change of Plea hearing be transcribed for this appeal or their prior appeal.

2 When the defendant was originally sentenced for the single Medicaid fraud charge, he was also sentenced for sexual assault charges in an unrelated case. HRS 706-629(2) mandates that when a defendant who is already under sentence is convicted of another crime committed prior to the former disposition, the court cannot sentence the defendant to probation if the defendant has more than six months left to serve on the term of imprisonment.

3 Appellant's first moved to withdraw their March 19, 2004 No Contest pleas in their February 9, 2009 Joint Memorandum in Opposition to the State of Hawai'i' s Motion for Order Directing Supplementation of PSI & Setting Sentencing Hearing. [See page 1 of their memorandum, ROA at 177 (Steven).]

4 According to Ho'ohiki, on the Judiciary's website, on October 5, 2004, in a hearing for *State v. Steven and April Schaefer*, CR No. 03-1-0060, the former Prosecutor, Michael Soong, stated that because the Defendants were sentenced in the district court "last week," the State was moving to dismiss the charges in the felony case with prejudice. The court ordered Mr. Soong to prepare the order. [See footnote 3 (page 8) and Exhibits A & B, attached to State of Hawai'i's November 7, 2008 Motion to Supplement PSIs, ROA at 153, 160-161 (Steven) and ROA at 271, 278-279 (April).]

In addition, the Addendums to the Defendants' March 19, 2004 No Contest plea forms in the subject misdemeanor cases state: "The State agrees not to seek any further criminal charges against me involving the complainants in these cases." [See Addendum to March 19, 2004 No Contest plea form, ROA at 18 (Steven) & 21 (April).]

5 Although the Hawai'i Supreme Court noted in *State v. Adams*, 76 Hawai'i at 414-415, 879 P.2d at 519-520, that in considering which remedy (resentencing or vacation of no contest pleas) is appropriate, the trial court should give "considerable weight to the choice of the defendant," the court also noted that there were additional factors to be considered: "the timeliness of the motion [to withdraw the plea], the extent of the breach, the prejudice to the parties, and which alternative will best serve the effective administration of justice."

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